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No. 80-774

In the

Supreme Court of the United States

OCTOBER TERM, 1980

HUGHES AIRCRAFT COMPANY, WALTER G. FINCH, and LaVERNE McLEAN, MARK McLEAN, and CALIFORNIA FIRST BANK, as Trustees of the McLean 1976 Family Trust,

Petitioners,

vs.

MESSERSCHMITT-BOELKOW-BLOHM, GmbH,

Respondent.

(On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit)

PETITIONERS' REPLY BRIEF

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Respondent's Brief in Opposition is remarkable in several respects, but particularly because the grounds upon which it urges this Court to deny our petition for certiorari involve, almost entirely, factual issues. On its face, that sort of presentation is out of place, since resolution of fact issues is surely not this Court's responsibility. Particularly startling it appears, however, when it is remembered that the judgment to which our

petition is addressed was a summary judgment, entered on respondent's motion, granted by the District Court in an opinion with detailed fact findings, and affirmed by the Court of Appeals on the premise (2a) that the "determinative facts on this appeal are undisputed".

In its deliberations on this case, the Court should remember that the "facts" to which the Brief in Opposition is almost wholly devoted are unproved, unsupported by any competent evidence, for the most part sharply disputed by petitioners, and in no way endorsed by the Court below.

We shall not burden this Court with a point-by-point refutation of respondent's version of the "facts". It should be sufficient to note that this was a *summary judgment,* entered without any trial on the merits. The holding of the Court of Appeals must therefore stand or fall on the undisputed facts set forth in its opinion; respondent's attempted self-serving embellishments rate zero consideration here.

Apart from its bootless reliance on assertions of fact which are beyond the record and sharply contested, respondent's Brief in Opposition contains two deplorable mis-statements, to-wit:

1. At page 11, respondent's brief refers to our point (Pet., 9-10) that in *Hughes Aircraft Co.* v. *United States* (Ct.Cl., 1976), 534 F.2d 889, the court's determination was based on specific findings that the United States had given "explicit 'authorization and consent' to the use in the Skynet vehicles of the patented inventions"; and respondent then tells this Court (RB11):

> "But the same explicit 'authorization and consent' were in fact given by the United States in

> respect to all HELIOS related activities as well".

That statement, accompanied by no record reference, alludes to an attempted *ex post facto* authorization and consent which issued from NASA in 1977, years after this action was commenced. That lame effort on NASA's part to shift liability from respondent to the United States was so patently sham and without legal effect that the District Court found it "unnecessary" (11a) to consider it, and the Court of Appeals ignored it entirely. It is, therefore, hardly cricket for respondent to tell this Court that HELIOS activities were carried on with "the *same* explicit 'authorization and consent'" by which our Government approved the use of petitioner's inventions in the Skynet spacecraft.

2. Again, referring to *Carrier Corp.* v. *United States* (Ct.Cl., 1976) 534 F.2d 244, respondent's brief states, at page 11, that:

> "Petitioners have their facts wrong. In *Carrier,* the sole action of the United States was the placing of refuse into containers on an Air Force base for subsequent collection and disposal by a contractor. The contractor used patented hoisting apparatus for lifting the containers onto a truck bed. The United States had no physical contact with or relationship of any kind to the patented hoisting apparatus."

Respondent also characterizes (RB12) the subject matter involved in *Carrier* as:

> ". . . patented hoisting apparatus for lifting the containers on to a truck bed".

> For total refutation of both the quoted statements, the Court need only consult the Court of Claims opinion in *Carrier*, 534 F.2d, at 246-247. There, on page 246, the Court of Claims stated clearly that the only issue concerned Carrier's patent No. 3,144,-149, "which relates to the detachable containers"; and, on page 247, the court stated that the *Government* performed the functions of "placing . . . refuse into the compactors and the activation of the devices electrically to compress the refuse into the [patented] detachable containers". Thus, in truth, petitioners do *not* "have their facts wrong". The patented articles in *Carrier* were not "hoisting apparatus"; they were "detachable containers". And, respondent notwithstanding, the Government *did* have "physical contact" with those patented articles.

Our case for issuance of the writ rests on the tenet — well founded, we submit — that the Fifth Circuit in this case has entered a judgment concerning the jurisdiction of the Court of Claims which is squarely at odds with the judgment entered by the Court of Claims in *Carrier*. In both cases, the election to use an infringing product — and hence to court an action for infringement — was made by a third-party contractor; in neither case did the United States require the use of the patented structure, select it for use, or operate it. In both cases, however, the United States did cooperate in the performance of the contract, did have physical contact with the patented structure, did derive benefit from the contract, and did pay valuable consideration for it. Yet in *Carrier*, the third party was held to be responsible for whatever patent infringement had occurred, whereas in this case the United States has been held to be solely liable.

It is as plain as day that the decision below is irreconcilable with the decision of the Court of Claims in *Carrier*. It is equally clear that the Court of Appeals erred in holding that *Hughes Aircraft Co.* v. *United States* (Ct.Cl., 1976), 534 F.2d 889, was a precedent "which strongly supports" the judgment which was entered below.

This is, most clearly, a case worthy of this Court's attention.

Respectfully submitted,

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